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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL CLEVINGER,

Defendant and Appellant.

D074137

(Super. Ct. No. SCE373142)

APPEAL from a judgment of the Superior Court of San Diego County, Evan P. Kirvin, Judge. Affirmed in part, vacated in part, and remanded for resentencing.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Michael Pulos and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Daniel Clevenger of assault with a deadly weapon (Pen. Code,¹ § 245, subd. (a)(1); count 1) and misdemeanor vandalism (§ 594, subd. (a)(b)(2)(A); count 3). It found true allegations that Clevenger personally used a deadly weapon, a vehicle, in the commission of the assault (§ 1192.7, subd. (c)(23); Veh. Code, § 13351.5). Clevenger admitted he suffered a prior serious felony conviction and a prior strike conviction (§§ 667, subds. (a)(1), (b)-(i), 668, 1192.7, subd. (c), 1170.12).

The trial court sentenced Clevenger to nine years in prison.² Clevenger appeals, contending (1) insufficient evidence supports his assault conviction because the victim's credibility was significantly impeached, and the victim offered inherently improbable or impossible testimony that was contradicted by other witnesses; and (2) this court should remand for resentencing because Senate Bill No. 1393 applies retroactively and allows the trial court to exercise its discretion to strike the five-year enhancement for his serious felony prior conviction.

We conclude Clevenger's sufficiency of the evidence challenge lacks merit. However, we hold Clevenger is entitled to resentencing to allow the trial court to exercise its discretion to determine whether to strike his five-year prior serious felony

¹ Undesignated statutory references are to the Penal Code.

² As to the count 1 assault, the court imposed the low term of two years doubled by operation of the strike prior conviction, plus an additional five years for Clevenger's serious felony prior conviction, totaling nine years imprisonment, with credit of nine actual and 18 section 4019 credits, for a total of 27 days custody credit. As to count 3, the court sentenced Clevenger to 365 days in custody concurrent to count 1.

enhancement. We therefore vacate Clevenger's sentence and remand the matter for resentencing. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

In July 2017, Alex F.³ took a borrowed red Ford Explorer to a mobile home park to help repair a friend's trailer, and parked the Explorer in the mobile home park's parking lot. Around lunchtime, Alex walked through the lot past the Explorer to meet his then-girlfriend, Barbara O., who was waiting for him in the passenger seat of her vehicle parked along an adjacent street. As Alex approached Barbara, he saw Clevenger drive by in his truck, look towards him, then make a U-turn. Alex and Clevenger had a turbulent relationship after Alex began dating Barbara, who was Clevenger's ex-girlfriend. Alex and Clevenger previously had multiple altercations, so when Clevenger made the U-turn to come back, Alex ran back to the Explorer and opened the driver's door so he could leave the area. Clevenger pulled into the parking lot and drove toward the Explorer while "revving" his motor. Alex grabbed a hammer from inside the Explorer and threw it at the oncoming truck's windshield, but it glanced off the truck. As Alex threw the hammer, he moved himself around the door of the Explorer, positioning the door between himself and Clevenger's truck. Clevenger's truck, which was not moving very fast, hit the Explorer's driver's door, folding it backwards against the front fender. Alex tried to jump back, but tripped and fell to the ground. Clevenger then backed up his truck and stopped. At some

³ We refer to the victim and witnesses by their first names for privacy purposes, and not out of disrespect.

point after the collision, another man, Jeffrey Scott Winston,⁴ jumped out of the passenger side of Clevenger's truck. Winston unsuccessfully tried to smash the Explorer's back window with a metal pipe. Then at Clevenger's urging to "go break her fucking windshield," Winston ran to Barbara's car and smashed its windshield. At that time, Alex did not know whether Barbara was seated in her vehicle because he was attempting to pull a brick from the ground in the parking lot. As he was leaving, Clevenger put his truck in reverse and backed it into Barbara's vehicle, damaging its front bumper and headlight area. Winston got back into the truck and Clevenger drove away.

Barbara initially left the scene on foot. Alex called police and waited for them with another individual, Joshua O., a mobile home park resident who had been in the parking lot working on his own car near the Explorer. After Barbara left and sheriff's deputies arrived, a drunk driver sideswiped her vehicle, causing additional damage. Alex asked Joshua to retrieve Barbara, and both witnesses returned to the scene and provided statements to the deputies.

Alex explained to a responding sheriff's deputy what happened, but told him he had been sitting in the Explorer's driver's seat when he saw Clevenger drive by, make a U-turn, and return to the parking lot. He did not tell the deputy about throwing a hammer at Clevenger's truck. Both Alex and Barbara told deputies that when Clevenger backed his truck into Barbara's vehicle, it forced the vehicle's front passenger side up onto the curb, though the deputies' photographs taken after the incident and before Barbara's car

⁴ The jury convicted Winston, Clevenger's codefendant at trial, of misdemeanor vandalism. (§ 594, subd. (a)(b)(2)(A); count 4.)

was sideswiped did not show it in that position. Though Barbara was standoffish and did not want to provide details after returning to the scene, she corroborated Alex's account when questioned by a deputy, telling him Clevenger's vehicle accelerated toward Alex and tried to ram him.

Another deputy interviewed Joshua, who reported he noticed a truck drive by on the adjacent street, then saw a passenger exit from it and use a baseball bat to hit the windshield of Barbara's car. Joshua told the deputy he watched as Alex was sitting in his Explorer with his legs hanging out, until the truck began to accelerate toward him "trying to run his ass over." According to the deputy, Joshua said Alex jumped out of the Explorer to try to get away, and the truck collided with the Explorer's open driver's side door to try to run Alex over. Joshua reported the truck exited the parking lot and backed into Barbara's car, while the truck's passenger tried to break the Explorer's back window. The deputy did not notice anything unusual about Joshua, who was coherent while talking about what happened.

Five days after the incident, another sheriff's deputy responded to a call involving a traffic stop of Clevenger's truck. The deputy photographed a large 35-inch wooden stick found in the back seat, as well as damage to Clevenger's truck consistent with a collision, including a red or maroon paint transfer on the front passenger side chrome bumper.

A sheriff's detective interviewed Clevenger after the traffic stop.⁵ Clevenger initially denied being at the scene of the incident or trying to run into Alex. He later claimed Alex had attacked him in the past and provoked him on that day by throwing a hammer at his truck. Clevenger admitted he acted in retaliation by driving his truck at Alex: "[Alex] came at me with . . . [¶] . . . [¶] a claw hammer and so I drove at him. And then, yeah I hit the fucking car. [¶] . . . [¶] Nobody was in it. [¶] . . . [¶] Okay? I hit it." Clevenger detailed how Alex positioned himself behind the Explorer's driver side door for protection from the impact of his truck: "[W]hen I pull in the parking lot, he runs past the fucking thing, and uses the fucking door of the truck as a shield. . . . And I ran into the door with the truck. Big fucking deal." After Clevenger learned he was charged with assault with a deadly weapon, he insisted everything he had told the detective was a lie and he was not at the scene: "I never fucking ran into shit."

Alleged Inconsistent Trial Testimony and Cross-Examination

At trial, Barbara denied seeing or hearing any collision between Clevenger's truck and Alex's Explorer. She denied telling the deputy she saw Clevenger try to ram Alex with his truck. Barbara testified she saw a green truck that looked like Clevenger's accidentally back up into the front of her car before driving off, but said she was standing on the street at the time. She denied seeing who was driving the truck or who came out and smashed her windshield. Barbara denied talking with Clevenger about her trial testimony. According to Barbara, she did not tell the deputy her car was hit so hard it

⁵ The jury heard audio recording of that interview.

was forced up onto the curb, because it never happened. She testified she did not want to tell police about the incident because she knew Clevenger would fix her car for her. Barbara agreed that Clevenger's truck was only going a couple of miles an hour when it turned into the parking lot.

At trial, Joshua testified that he saw a truck, which was not travelling at a fast rate of speed, hit the Explorer's door, but he did not remember Alex being nearby or in the area of the Explorer when that happened. He testified the two men in the truck and Alex and Barbara were yelling back and forth beforehand. He did not remember seeing Alex with a hammer, or recall that Alex threw a hammer at the truck. He did not remember seeing anyone with a pole or bat, and did not think he saw either of the men from the truck hitting the Explorer in any other way. Joshua also did not recall seeing the truck collide with Barbara's vehicle. According to Joshua, what he told the deputy "might have been obscured a little bit from the truth of what happened" because Alex tried to tell him what to say, and his statement to the deputy was "a little bit of both" the truth and what Alex told him to say. He could not recall which parts of his story came from Alex. Nevertheless, Joshua agreed his memory was better at the time of the incident than at the time of trial. He was unable to identify either defendant as being in the truck on the day of the incident.

On cross-examination, Joshua testified he had been up for four or five days and high on methamphetamine both when he observed the incident and when he spoke with the deputy. He testified the drug affected his perception and memory. Joshua attributed his statement to the deputy, that Clevenger was trying to run Alex over, to what Alex had

"probably coerced" him to say because he did not think Alex was near the Explorer when the truck collided with it. Joshua also stated that the day before he was to testify, Alex spoke to him about asserting his Fifth Amendment privilege against self-incrimination. Joshua clarified Alex did not tell him what to say; Alex only spoke of his own intention to invoke the privilege, and did not suggest that he should also do so. Joshua nevertheless guessed Alex was "trying to get [him] to go along with his program again."

On Alex's cross-examination, defense counsel sought to point out discrepancies between Alex's trial testimony and preliminary hearing testimony. Alex admitted that at the preliminary hearing he testified the truck that hit the Explorer's door was a different model and color, he did not see the truck's driver and did not know who it was, he did not see the truck hit Barbara's car, and he did not hear Clevenger direct his codefendant to smash Barbara's windshield. When counsel pointed out none of the deputy's photographs showed Barbara's car had been pushed up onto the curb, Alex explained that the car was knocked back onto the street by the drunk driver. Alex admitted he lied at the preliminary hearing because he "felt bad" for Clevenger, and did not want to see Clevenger go to prison for having a "bad day" ⁶ Alex also acknowledged sending a text message to Barbara before trial telling her to "stick with the story," but stated he was referring to the truth.

⁶ On redirect examination, Alex testified that Clevenger had come to his house a month before trial and asked him to not show up to court.

DISCUSSION

I. Sufficiency of the Evidence of Assault with a Deadly Weapon.

Clevenger contends there is insufficient evidence to support his assault conviction. He maintains Alex's testimony was inherently improbable, and "virtually physically impossible" on several points, including the position of Barbara's vehicle after Clevenger hit it with his truck. He argues Alex had "severe issues with reliability," that his account of events was implausible and contradicted by accounts from Joshua and Barbara, and his credibility is undermined by the fact he admitted perjuring himself at the preliminary hearing.⁷ Clevenger maintains the evidence shows Alex "coached" witnesses on what to say to deputies at the scene and how to testify, and points out Alex asserted his Fifth Amendment rights and received immunity to testify. Under these circumstances, and because Alex was the only person placing himself at the Explorer at the time of the collision, Clevenger maintains there is no "solid evidence" he assaulted Alex with a deadly weapon, rather, he argues the evidence shows Clevenger only hit Alex's car, not his person. According to Clevenger, this is a case where the testimony "is objectively so unreliable that it cannot sustain a conviction."

A. Standard of Review.

When an appellant challenges a conviction based on insufficiency of the evidence, our task is to "review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a

⁷ Clevenger also asserts Alex admitted he lied to deputies, but the record citations do not bear that out.

reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.

[Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence." ' ' ' (*People v. Penunuri* (2018) 5 Cal.5th 126, 142; *People v. Gomez* (2018) 6 Cal.5th 243, 280.) Testimony of a single witness is sufficient to support a conviction unless the testimony describes facts or events that are physically impossible or inherently improbable. (*People v. Elliott* (2012) 53 Cal.4th 535, 585; *People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Under this standard, " '[i]f the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.' " (*People v. Westerfield* (2019) 6 Cal.5th 632, 713; *People v. Shamblin* (2015) 236 Cal.App.4th 1, 9.) That is, " ' ' '[a]n appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise.' " ' ' ' (*People v. Salazar* (2016) 63 Cal.4th 214, 242.) " 'A reversal for insufficient evidence "is

unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' " the jury's verdict.' " (*People v. Penunuri, supra*, 5 Cal.5th at p. 142.)

B. Substantial Evidence Supports Clevenger's Assault with a Deadly Weapon Conviction

Section 245, subdivision (a)(1) prohibits "an assault upon the person of another with a deadly weapon or instrument other than a firearm" (§ 245, subd. (a)(1).) Section 1192.7, subdivision (c)(23), requires the defendant "personally use[] a dangerous or deadly weapon." (§ 1192.7, subd. (c)(23).) It has long been held that cars can be deadly weapons. (See *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 458 [citing cases]; *People v. Nuno* (2018) 26 Cal.App.5th 43, 51-52.) And the test for assault is whether a reasonable person, viewing the facts known to the defendant, would find the act in question would directly, naturally, and probably result in physical force being applied to another, i.e., a battery. (*Bipialaka*, at p. 459, citing *People v. Williams* (2001) 26 Cal.4th 779, 782; *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1183, 1186-1187.) Assault, a general intent crime (*People v. Perez* (2018) 4 Cal.5th 1055, 1066), does not require an intent to cause an application of physical force or substantial certainty that force will be applied, and it is sufficient if a defendant scares his victim into believing a serious collision was imminent. (*Bipialaka*, at p. 458.) Under these standards, Clevenger's act of driving his truck into Alex's car door while Alex stood behind it—as described by Alex to deputies and at trial, confirmed by Barbara and Joshua's statements to deputies at the scene, and admitted by Clevenger to an interviewing detective—is substantial evidence of assault with a deadly weapon.

This court is not persuaded by Clevenger's arguments that Alex's testimony was so riddled with improbabilities or physical impossibilities that it must be rejected.

Clevenger makes much of the fact that both Alex and Barbara told deputies that when Clevenger's truck collided with Barbara's car, it was pushed up onto the curb, but the deputies' photographs did not show her car in that position. Whether Barbara's car was struck with such force by Clevenger's truck that it was pushed up onto the curb is not of consequence to Clevenger's conviction, and it was within the jury's province to disregard that evidentiary conflict. In any event, it would not be unreasonable, and far from impossible, that Clevenger's impact pushed Barbara's vehicle up the curb, but that the vehicle rolled back off the curb before deputies photographed it. Regardless, this discrepancy is irrelevant to Clevenger's conviction.

Clevenger also urges that Alex's testimony about running behind the door of the Explorer was implausible; he suggests it could not have happened while Clevenger gunned his motor and drove at Alex in one continuous motion. The jury was shown exhibit photos that displayed the distance from the sidewalk near Barbara's vehicle to Alex's Explorer in the parking lot and heard testimony about the slow speed at which Clevenger drove his truck toward the Explorer. Alex testified that the truck was moving only "a couple miles an hour, five miles [an] hour maybe." Jason testified the truck was going only a couple miles an hour, and agreed with the characterization of the truck "push[ing]" the front door of the Explorer forward. The jury accepted that Alex had enough time to run back to his Explorer, retrieve and throw a hammer at Clevenger's oncoming truck, and position himself behind his driver's side door before Clevenger's

truck contacted it. We view nothing " 'physically impossible or inherently improbable' " about this testimony or the scenario, and it is not our role to resolve evidentiary conflicts as to the account. (*People v. Gomez, supra*, 6 Cal.5th at p. 280.)

We disagree that Alex's credibility was so diminished that no reasonable jury could avoid a reasonable doubt as to Clevenger's guilt. Clevenger refers at length to Alex's lack of credibility, claiming he coached witnesses, admitted to perjury, texted Barbara to "stick to the story," and discussed with Joshua his intention to plead his Fifth Amendment rights against self-incrimination. Clevenger likens Alex's testimony to the victim's testimony in *People v. Williamson* (1984) 161 Cal.App.3d 336 because both assertedly contain inconsistencies and impeachments that undermined their sufficiency to sustain the judgment. In *Williamson*, the defendant's conviction was reversed because it depended entirely upon the credibility of the victim, which was poor.⁸ (*Id.* at p. 338.) However, unlike *Williamson*, Clevenger's conviction does not depend solely on Alex's testimony, which was corroborated by other witness statements as well as Clevenger himself. Regardless of the inconsistencies in Alex's testimony, the theory that Alex was positioned between his Explorer's driver side door and front fender as Clevenger drove

⁸ In *People v. Williamson, supra*, 161 Cal.App.3d 336, there was evidence that the victim was angry at and said she " 'hat[ed]' " the defendant, her mother's boyfriend, who had threatened to "whip [the victim's boyfriend's] butt" for making a derogatory remark about the victim's mother. (*Id.* at p. 339.) Although the victim stated that the defendant had raped her and ejaculated twice, no spermatozoa or seminal fluid was found either during a medical examination of the victim or on the bed where the crimes allegedly occurred, and though she stated the perpetrator came into the house through a window, the defendant concededly was in possession of a set of keys to the residence. (*Id.* at pp. 339-341.) Her account to police and at trial were different. (*Id.* at p. 341.)

towards him was reiterated by both Alex, the victim, and Clevenger, the perpetrator. Clevenger told the sheriff's detective: "[S]o I drove at him. And then, yeah I hit the fucking car." "[W]hen I pull in the parking lot, he runs past the fucking thing, and uses the fucking door of the truck as a shield. . . . And I ran into the door with the truck."

Moreover, where Alex was positioned at the time of impact was never the subject of impeachment or an inconsistent statement by Alex. Throughout the initial investigation, the preliminary hearing and trial, Alex remained firm that he was in the collision path of Clevenger's truck, and Clevenger's own admission to the interviewing sheriff's detective acknowledged this account.

Clevenger's argument that this court must reject Alex's testimony confuses this court's ability to reject testimony as physically impossible, with re-weighting credibility because a witness's testimony is inconsistent. As stated, credibility is " 'the exclusive province of the trier of fact.' " (*People v. Gomez, supra*, 6 Cal.5th at p. 281; *People v. Brown* (2014) 59 Cal.4th 86, 106; *People v. Young, supra*, 34 Cal.4th at p. 1181.) In *People v. Brown*, evidence attacking the credibility of the prosecution's witness "was presented to the jury and argued at length by counsel" after the witness "denied that defendant had confessed [to a murder to her] . . . [,] did not reveal the confession until 33 months after her initial police interview . . . [,] gave inconsistent accounts of where the confession allegedly occurred . . . [,] [and] conceded that she was using drugs and was angry with defendant at the time." (*Brown*, 59 Cal.4th at pp. 104-105.) Because "[t]hese points go to the weight of the evidence," and did not reveal any physical impossibilities, the California Supreme Court held "the trial court acted properly

in leaving the weight of the testimony to the jury." (*Id.* at p. 105; see also *Gomez*, 6 Cal.5th at p. 280 [despite defendant's characterization of one witness as " 'incredible as a matter of law' " due to his checkered past, prolonged drug addiction, association with drug traffickers, readiness to lie to authorities and admissions of feigned hallucinations to collect social security benefits, appellate court declined to reject witness accounts that contradicted each other; a rational jury could have credited their testimony despite the inconsistencies, and it constituted substantial evidence of the defendant's guilt].) Like the witness in *Brown*, the accumulation of issues with Alex's credibility was extensively argued to the jury, which elected to believe him. Those inconsistencies do not by themselves compel a rejection of his testimony, because they do not give rise to physical impossibilities.

Clevenger cites *In re Roderick P.* (1972) 7 Cal.3d 801, to suggest his conviction is so severely undermined by "objectively [] unreliable" evidence that it must be reversed. In *Roderick*, the defendant's conviction was reversed because the abundance of evidence against him alluded to his innocence: he was a mentally-challenged 14-year-old who had an alibi, and who did not possess the temperament or physical ability to carry out the brutal attack on the homicide victim. (*Id.* at p. 810.) Unlike *Roderick*, Clevenger's conviction is not against an excess of contrary testimony. Alex was not the only witness who placed himself in Clevenger's collision path. At the scene, Barbara told a deputy she saw the truck try to ram Alex, and Joshua told a deputy he watched Clevenger drive towards Alex "trying to run his ass over" before Alex jumped out of the way. Though at trial both Barbara and Joshua recanted their statements placing Alex in Clevenger's

collision path, the jury was entitled to believe they had been truthful in making their prior statements to police, and the jury believed Alex's testimony and Clevenger's statements that support a finding of Clevenger's guilt.

Clevenger argues his false admissions to the sheriff's detective were improperly used by the jury to sustain his conviction. Clevenger suggests his admissions should be treated as insufficient to prove guilt like the statements of the defendant in *People v. Jenkins* (1979) 91 Cal.App.3d 579, whose lies about his involvement with a drug laboratory and use of a false name were sought to be used as "consciousness of guilt" by the People to support his convictions of manufacturing and possession of restricted substances. (*Id.* at p. 585.) The appellate court in *Jenkins* held that evidence of the defendant's falsehoods—which could be explained by many plausible reasons other than guilt—did not establish the defendant's dominion and control over the illegal substances and could not alone warrant either of his convictions. (*Id.* at pp. 585-587.) Unlike *Jenkins*, the statements by Barbara, Joshua, and Alex validate the admissions Clevenger initially made to the sheriff's detective, which he later claimed were false. The jury was entitled to believe Clevenger accurately recounted events to the detective, then retracted his story when realizing the consequences of his actions.

In reply, Clevenger further suggests the evidence is like that in *People v. Redmond* (1969) 71 Cal.2d 745, arguing that "even an eyewitness identification has been rejected, if sufficiently impeached." But Clevenger mischaracterizes *Redmond*, which is inapposite in any event. In that case, the California Supreme Court reversed a burglary conviction for lack of substantial evidence of the defendant's guilt. (*Id.* at pp. 757, 760.)

The 79-year-old victim in *Redmond* testified that she and her husband were burglarized by a salesman who had been to their home the day before. According to the victim, the man's entire face was covered with a mask, but he was wearing the same coat as the salesman, a black and white tweed sports coat. (*Id.* at pp. 748-749.) At trial however, the victim never identified the defendant as the assailant or the salesman, testifying only that the defendant " 'resembl[ed]' " him. (*Id.* at p. 756.) An officer testified the victim during a lineup said the assailant's coat was brown, and that she could not identify the defendant as either the assailant or the salesman. (*Id.* at p. 751.) The defendant testified that the only tweed sport coat he owned was powder blue, and his parents, with whom he lived, testified that they were familiar with their son's clothes and that he did not have a black and white tweed sports coat. (*Id.* at p. 752.) The defendant came on his own volition to the police station, and he agreed to participate in the lineup, give his fingerprints, and "do anything he could to clear up this matter." (*Id.* at p. 751.) The *Redmond* court concluded under "the circumstances there [was] no basis for a conclusion that [the wife] identified defendant as her assailant or as the television salesman either at the trial or at the lineup." (*Id.* at p. 756.)

Clevenger incorrectly states that *Redmond* involved an eyewitness "identification" that was impeached. But in *Redmond*, the evidence of the defendant's identity amounted only to an insufficient "strong suspicion of . . . guilt." (*People v. Redmond, supra*, 71 Cal.2d at p. 755.) The flaw in *Redmond* was the victim's inability to identify the defendant as the assailant, countered by evidence from the defendant's parents corroborating that their son did not have a jacket similar to the one the victim described

on the assailant, and the defendant's conduct consistent with innocence, voluntarily participating in a lineup and cooperating with police. Here, there is direct evidence, plainly believed by the jury, that Clevenger drove his truck at Alex while Alex stood behind the Explorer's door.

Even if the jury had discarded Alex's entire testimony as false, it could have properly accepted that he was standing in the collision path of Clevenger's truck in view of Barbara's and Joshua's initial statements to deputies and Clevenger's own admission during his police interview. Ample evidence permitted the jury to find Clevenger guilty of assault with a deadly weapon. We therefore affirm his conviction.

II. *Resentencing Clevenger is Appropriate Under Sections 667 and 1385*

Clevenger contends we should remand this matter for the trial court to exercise its discretion to strike or dismiss the five-year sentence enhancement imposed for his serious felony prior conviction under sections 667, subdivision (a) and 1385, subdivision (b). Those statutes were amended effective January 1, 2019, to give the court such discretion. (Stats. 2018, ch. 1013, §§ 1-2; *People v. Sexton* (2019) 37 Cal.App.5th 457, 472.)

The People concede, and we agree, that the new law applies retroactively to Clevenger's conviction because his case is not yet final. (Accord, *People v. Sexton*, *supra*, 37 Cal.App.5th at p. 472; see also *People v. Garcia* (2018) 28 Cal.App.5th 961, 973-975; *In re Estrada* (1965) 63 Cal.2d 740, 744-745 ["If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies"].) Thus, we will remand to give the trial court the

opportunity to exercise its newly-conferred discretion. We express no opinion about how the court should exercise that discretion.

DISPOSITION

Clevenger's sentence is vacated and the matter is remanded for the trial court to exercise its discretion under sections 667, subdivision (a) and 1385, subdivision (b) whether to dismiss or strike Clevenger's serious felony conviction enhancement and resentence Clevenger accordingly. In all other respects, the judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

DATO, J.